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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 196~~0~~1

Nos. ~~701~~ and 778

~~514~~ 61

UNITED GAS PIPE LINE COMPANY,
Petitioner, Appellant,
v.
IDEAL CEMENT COMPANY,
and
SCOTT PAPER COMPANY,
Respondents, Appellees

NO. 721, ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 778, ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CITY OF MOBILE, ALABAMA

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BRIEF AMICUS CURIAE OF THE CITY OF MOBILE, ALABAMA

Interest of Amicus Curiae

The City of Mobile, Alabama (hereinafter Mobile), files this brief pursuant to Rule 42(4) of the rules of this Court, urging the Court to review and reverse the

decision of the Court of Appeals for the Fifth Circuit reported at 282 F.2d 574 (see also 282 F.2d 580) and restore the decision of the District Court (176 F. Supp. 748).

Mobile is a political subdivision of the State of Alabama, and this brief is sponsored by its authorized law officers.

The validity of Mobile's taxing ordinance, in relation to the commerce clause of the federal Constitution, is the subject of this controversy, though Mobile is not a party to the suit. Notwithstanding technical principles of res adjudicata (opinion below, App. A, Jurisdictional Statement, at p. 20), the effect and sweep of the decision of the Fifth Circuit is to knock out the taxing power of Mobile, and the state, over a subject historically treated by this Court and the Congress as a subject of both local regulation and taxation, namely, the direct sale of natural gas by interstate pipelines to industrial consumers (local regulation, *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507; local taxation, *Southern Natural Gas Corporation* v. *Alabama*, 301 U.S. 148). For the city government, there is also placed in jeopardy past tax collections involving a half-million or more dollars.

This novel denial of an established taxing power over interstate companies doing a local business will immediately place local distributors of natural gas to industrial users at a competitive disadvantage (which this Court deemed an important consideration in *International Harvester Co.* v. *Dept. of Treasury of Indiana*, 322 U.S. 340, 349). Moreover, if the decision is permitted to stand it opens the way for an increased yet simple form of avoidance of municipal and other

state taxation by both interstate pipelines and electric power companies who, by a slight change of a line or other installation, or of merely business arrangements, can serve industries in the state directly with natural gas and power from out-of-state, tax free.[1]

The means used by the Fifth Circuit in making such a result possible is the "victory for empty formalism" rejected by this Court in *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 493, and should be rejected here to demonstrate once again that this Court is "on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution." *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 445.

Review By Appeal or Certiorari

Appellant or petitioner, United Gas Pipe Line Company (hereinafter United), obtained a judgment of the United States District Court for the Southern District of Alabama for recovery from two of its direct industrial customers, Ideal Cement Company (Ideal) and Scott Paper Company (Scott), of the license or business taxes it paid Mobile based on United's sales of natural gas to these customers. The judgment

[1] The likelihood is accentuated by the Court of Appeal's recognition that receipts from gas supplied to the industrial customers by a local distributor is subject to the tax, and by subjecting to the tax even that portion of the distributor's service charge to the interstate pipeline company when it acts as agent for the pipeline company in transporting the gas to, and collecting the price from, the industrial customers, but exempting from the tax the net proceeds (i.e. minus the service charge) to the pipeline company (On Second Petition for Rehearing, Nov. 16, 1960, see App. C, Jurisdictional Statement, p. 30).

rested on the validity of the taxing ordinance and agreements by the customers to reimburse United for valid taxes, 176 F. Supp. 748.

The Fifth Circuit reversed the District Court, holding that the application of the taxing ordinance to sales and deliveries to these direct industrial customers by United was a direct tax on the flow of interstate commerce and a violation of the commerce clause of the Constitution.

United has filed both an appeal and a petition for certiorari from this action of the Court of Appeals. While either procedure should accomplish the necessary review, the action of the Fifth Circuit is properly the subject of an appeal under 28 U.S.C. 1254(2), which covers, under the precedents, municipal ordinances "held by a court of appeals to be invalid as repugnant to the Constitution." Appeals were allowed in like situations, where both appeal and petition for certiorari were presented, in *City of Detroit* v. *Murray Corp.* 355 U.S. 389, and in *City of Chicago* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 357 U.S. 77.

ARGUMENT

The Tax Ordinance

The ordinance in issue is described as the License Code of the City of Mobile enacted, under authorization of state law,[2] in December, 1954, effective for the years 1955 and thereafter. The ordinance provides

[2] Title 37, section 735, Code of Alabama 1940, as amended. Section 745 as amended in 1949 limits the tax on gross receipts of utilities to 3%. Under section 735, all businesses may be covered, but in the case of interstate business only that portion confined within the limits of the state and where the person or firm has an office or transacts business in the city or town.

for what is described as a "license tax" or "privilege tax" (see section 20 thereof) imposed on persons or firms for the privilege of engaging in named businesses in the City of Mobile or the environs subject to its jurisdiction (the so-called police jurisdiction). Other than the payment of the tax on an annual basis, and the making of a sworn statement to support it, no other conditions are imposed.

In the case of gas companies, with which this case is concerned, the tax is measured by the gross receipts from sales within the jurisdiction of Mobile for the preceding year (3% of gross receipts for Mobile proper, 1½% for the police jurisdiction). No distinction is made between persons and firms engaged in interstate or intrastate business; but section 16 of the ordinance provides that no provision of it shall be applied to impose any unlawful burden on interstate commerce or in any manner repugnant to the constitutions of the United States or Alabama, and section 24 provides severability if any provision of the ordinance should be held invalid.

The penalties for failure to pay the license tax when due or delinquent, or to engage in business without paying the tax, are those usually associated with the collection of taxes, such as increase of the amounts otherwise due, fine, imprisonment, and tax lien against property used in the business (sections 17, 19, 20, 21). The ordinance makes no claim to injunctive relief against persons or firms who do not pay, though the Court of Appeals appeared to attach significance to the alleged existence of the remedy of injunction under the state code of Alabama (Appendix A, Jurisdictional Statement, p. 27). This is a matter we will discuss later.

In the context of this case, the business for which the license or privilege tax is exacted is that of selling or distributing (a synonym in the natural gas trade for selling and transmitting at retail) natural gas to consumers in Mobile or its police jurisdiction. Actually, the transactions involved in this case were effected by the local distributor, Mobile Gas Service Corporation, which, as agent for United, delivered the gas to the industrial consumers through its lines and billed and collected the purchase price. From the purchase price the local distributor deducted an agreed 2 cents per thousand cubic feet service charge, and remitted the balance to United. The local distributor paid the license or privilege tax on the 2 cents per mcf service charges, which the Court of Appeals upholds as proper; but the tax on the balance of the proceeds, paid over to United, the Court of Appeals has struck down as violating the commerce clause of the Constitution.

Direct Interstate Sales to Consumers Are Local Acts

If there is one proposition which has been established in our jurisprudence, by decisions of this Court and by Act of Congress, it is that direct sales and deliveries of natural gas by interstate pipeline companies to industrial consumers are local acts for purposes of regulation and taxation. This was so both before and after the adoption of the Natural Gas Act, and was confirmed as recently as this Court's decision of January 23, 1961 in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, Nos. 45 and 46, Oct. term 1960, slip op. p. 25.

Before adoption of the Natural Gas Act of 1938 (52 Stat. 821, as amended, 15 USC § 717 et seq.), this Court said, in upholding local regulation of rates, that the

direct transmission of natural gas from a source outside the state to local consumers in the state:

> "while part of interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State; nevertheless, the service rendered is *essentially local*, and the sale of the gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to *factories* and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city." [emphasis added] *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23, 30-31.

And the Court went on to hold that this local service is not of that character which requires general and uniform regulation of rates by congressional action, 252 U.S. at 31.

In *Barrett* v. *Kansas Natural Gas Co.*, 265 U.S. 298, which distinguished transportation and sales by interstate pipeline companies to distributing companies for resale, the Court nevertheless went on to point out that:

> "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the *transporting company* or by independent distrib-

uting companies." [emphasis added] 265 U.S. at 309.

Barrett was so quoted and relied on by the Court in upholding a state excise tax on a pipeline corporation supplying natural gas to consumers, *East Ohio Gas Company* v. *Tax Commission of Ohio*, 283 U.S. 465, 472.

After the adoption of the Natural Gas Act of 1938, this Court again upheld local regulation of rates of direct sales by interstate pipeline companies to industrial consumers as a matter specifically recognized by Congress in the adoption of the Act, *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507 (first *Panhandle* case). It was held that, historically, direct sales to consumers, as distinct from sales for resale, had been in the permissible area of state control, and that now the line of the statute cut sharply between the two on the same line arrived at before the Act was passed. 332 U.S. at 514, 517. Significantly, in relation to the instant problem, the Court noted:

". . . [T]he Supreme Court from the beginning allowed the state both *to tax* and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also necessarily the last sale because consummated by consumption. Powell, Note, 58 Harv. L. Rev. 1072, 1082." [emphasis added] 332 U.S. at 517, fn. 12.

This authority was used most recently by the Court in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, Nos. 45, 46, Oct. term 1960 (January

23, 1961), slip op. p. 25, citing and relying on the first *Panhandle* case, supra, respecting state control of direct sales of natural gas by interstate pipelines, and pointing out:

> "This power was recognized at the time the Act was passed, see Powell, Note, Physics and Law Commerce in Gas and Electricity, 58 Harv. L. Rev. 1072, and it is clear that Congress excepted federal regulation of direct sales precisely for this reason. See H.R. Rep. No. 709, 75 Cong., 1st Sess. 1-2."

It is obvious from that underlying Report, to quote it, that "there is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction." H.R. Rep. No. 709, 75 Cong. 1st Sess., p. 1.

In the second *Panhandle* case, *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, further underscoring local control, this Court upheld a state requirement of a certificate of public convenience and necessity for an interstate pipeline company to make direct sales to industrial consumers of natural gas. The Court held this was not a violation of the commerce clause of the Constitution, that it was permissible regulation not prohibition. The sales, said the Court, are interstate commerce but are "essentially local" in aspect and subject to state regulation without infringement of the commerce clause. The pipeline proposes to use the streets of Detroit and its environs. "Direct sales for consumptive use were designedly left to state regulation." 341 U.S. at 333, 334.

Local Taxing Valid Unless It Imposes Regulation In Conflict With Federal Regulation

The pattern of local regulation of rates and certificates for direct sales of natural gas by interstate pipeline companies to industrial consumers has progressed hand-in-hand with local taxation of such business, without clash with the commerce clause of the federal Constitution. This is not strange, in view of the "extremely limited restrictions that the Constitution places upon the states" [3] in the exertion of taxing power, and more pointedly because a local tax is judged to violate the commerce clause only if its effect is to "regulate" in conflict with national power. As Mr. Justice (later Chief Justice) White explained in *American Steel and Wire Co.* v. *Speed*, 192 U.S. 500, 521, the question to be determined is not whether "interstate commerce was to be considered as having completely terminated," but whether a particular exertion of taxing power by a state "so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress." The concept is repeated in many cases. Illustrative is the discussion in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 45, where Mr. Justice (later Chief Justice) Stone spoke for the Court of the forms of taxation where the tendency is to prohibit the interstate commerce or place it at a disadvantage in competition with intrastate commerce, as familiar examples of state taxing power used in an unconstitutional manner "be-

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[3] *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 445, repeated with approval in *Northern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457.

cause of its obvious regulatory effect upon commerce between the states."

The meaning of "prohibited regulatory effect" upon commerce, the Court went on to say, is "a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage." 309 U.S. at 45, fn 2.[4]

A more detailed index of factors in deciding whether the tax has a prohibited regulatory effect was provided in *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U.S. 662. In that case Mississippi was sustained in imposing a privilege tax for conducting business activities measured by the gross proceeds of a firm engaged in the business of operating a pipeline that transported oil between points within the state in the course of the interstate journey of the oil. The prevailing opinion of the Court was that even if this were to be regarded as a "direct" tax on the "privilege" of engaging in interstate commerce the tax does not violate the commerce clause of the Constitution:

> "Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt

[4] Another apt summation of "prohibited regulatory effect" upon commerce was provided by Mr. Justice Cardozo when he said in *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 527

> "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."

to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate this tax." (citations of authorities omitted) 337 U.S. at 667-668.

Local Taxation of Direct Selling of Natural Gas To Consumers

Thus the economic burden of nondiscriminatory local taxation on direct interstate sales and deliveries of natural gas to consumers has been viewed as entirely consistent with the local economic regulation expressly reserved to the states over this phase of interstate commerce.

In *Southern Natural Gas Co.* v. *Alabama*, 301 U.S. 148, this Court sustained a franchise tax on an interstate pipeline company doing business in Alabama (computed on total capital employed in the state), where the company had three customers engaged in distribution (resale) and one direct industrial consumer customer. The Court viewed the tax as one on the privilege of doing business in Alabama and rested its validity on the fact that the pipeline company had one direct industrial consumer customer, the meeting of whose needs, said the Court, are as much a local activity as the supplying of service to consumers in municipalities, the taxing of which was upheld in the *East Ohio Gas Company* case, supra (283 U.S. 465).

In *Illinois Natural Gas Company* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 505, 506, the Court took note of its decisions which have sustained nondiscriminatory taxes on sales to buyers in the taxing state of commodities shipped interstate in performance of sales contracts, "not upon the ground that the delivery was not part of interstate commerce . . . but be-

cause the tax was not a prohibited regulation of or burden on that commerce." Turning then to *Southern Natural Gas Corp.* v. *Alabama*, supra, the Court said in that case it had held:

> "the sale of gas to a local industrial consumer by one who was piping the gas into the state was a local business sufficient to sustain a franchise tax on the privilege of doing business, within the state, measured by all the taxpayer's property located there, including that used for wholesale distribution of gas to local public service companies."

In *Memphis Natural Gas Company* v. *Beeler*, 315 U.S. 649, this Court upheld a privilege tax, measured by net income from distribution of natural gas to Tennessee consumers, under an arrangement whereby an interstate pipeline company delivered gas into the mains of a local distributing company for sale and distribution to consumers, with the sale proceeds divided between the two companies (an arrangement not too far unlike that in the instant case). The Court held that the retail sale of gas at the burner tips, whether by one who pipes the gas into the state or by a local distributor who acquired it from an out-of-state pipeline source, is subject to "state taxation and regulation." 315 U.S. at 653, also citing *Southern Natural Gas Corp.* v. *Alabama*, supra.

With these cases, among others, in mind, it is therefore not surprising that the Court should observe by the time of the first *Panhandle* case, decided in 1947, that from the beginning the Court allowed the state to tax, as well as fix the prices of, direct interstate sales or deliveries of natural gas (and electricity) to consumers, 332 U.S. at 517, fn 12, quoted above.

The Tax Is On The Privilege of Selling Connected With Interstate Commerce Which Must Bear Its Share of Taxation

We think the Court of Appeals became unnecessarily distracted by a purported need to find (and failure to find), some physical point at which one could say that the transmission by United to its industrial customers in Mobile is "separable" from interstate commerce or "transformed into intra-state commerce" in order to sustain the tax (see App. A, Jurisdictional Statement, at p. 25).

The transmission is inter-state commerce, and the controlling consideration is that the "privileges closely connected with interstate commerce may be regarded as distinct for purposes of taxation . . . notwithstanding the 'practical continuity' of the taxed productive operation and the interstate movement." *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604, 610.

As the Court there said, in upholding a license tax on the production and use of electric power in compressors to move natural gas in interstate commerce, the exemption of those engaged in interstate commerce from taxation which others bear should not be extended beyond the necessity of keeping that commerce free from interference.

In *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, the Court made the point even plainer when it said:

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens even though it increases the cost of doing the business. 'Even interstate business must pay its way.' (citations omitted) and the bare fact that one is carrying on

> interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business." 303 U.S. at 254.

The instant tax and the tax ordinance is like a score or more of similar taxes and ordinances passed upon and sustained by this Court (noted above and hereinafter), and like hundreds of similar taxes and taxing ordinances in effect throughout the country resting unquestioned upon those decisions. The incidence and impact of such taxes has been aptly described in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, where this Court said that the tax "is conditioned upon a local activity, *delivery of goods within the state upon their purchase for consumption*. . . . The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce" (emphasis supplied) 309 U.S. at 58.

As the Court also said, there is no basis to distinguish a tax on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey, from the tax which may be laid in like fashion on the property itself. Nor is there a distinction between a tax on property, or the sum of all the rights and powers incident to ownership of property, or taxation of the exercise of some of the constituent elements of ownership. Equally, the transfer of possession upon a sale is taxable. 309 U.S. at 52-53.

The Court of Appeals used as its guide the group of cases exemplified by *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, which is clearly inapposite in the

light of the many decisions governing taxability of the privileges connected with the commencement and termination of interstate transportation and transmission. Actually, *Spector* recognized these cases. *Spector* precluded only a tax attached "solely to the franchise of petitioner to do interstate business," 340 U.S. at 609. In arriving at the conclusion that this was the "operating incidence" of the tax (340 U.S. at 608-609), the Court relied on the construction it had specifically asked the Connecticut courts to provide (*Spector* v. *McLaughlin*, 323 U.S. 101), and the Court did not repudiate, but rather accentuated, reliance on *Wisconsin* v. *J. C. Penney*, 311 U.S. 435, 444 (340 U.S. at 606, fn 3). Significantly, the Court said:

> "The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, is subject to the sovereign power of the State. These taxes may be imposed although the payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory." 340 U.S. at 609.

Cases like *Spector* have invariably recognized the permissibility of state levies on incidents connected with interstate commerce that are essentially local and not repeated in each taxing unit. *Joseph* v. *Carter and Weekes S. Co.*, 330 U.S. 422, 429. And, as the minority of the Court in *Spector* pointed out, even "exclusively interstate commerce" receives adequate protection when state levies are fairly apportioned and nondiscriminatory. 340 U.S. at 615.

The Validity of the License Tax

The Court of Appeals has permitted itself to be drawn away from the pertinent precedents and considerations by concentration on the word "license" and labeling this taxing ordinance one which makes "the procurement of a license a precondition of engaging in interstate commerce within its jurisdiction." (App. A, Jurisdictional Statement, at page 27).

It might be borne in mind that this is an ordinance which, apart from the annual payment of the tax, requires no qualifications or performances in order to engage, or before engaging, in business in Mobile, and confers no discretion on the municipal officers to refuse or deny a license. And, of course, it does not single out interstate businesses for treatment different from intrastate businesses. Nowhere in its opinion does the Court of Appeals cite or consider the long line of cases, beginning with *American Manufacturing Company* v. *St. Louis*, 250 U.S. 459, which has solidified into local taxing structure the so-called license tax or privilege tax on specified businesses, measured by the volume of business done even though that business is part of interstate commerce.

In *American Manufacturing Company* v. *St. Louis*, the city ordinance imposed a tax on manufacturers as a condition of the grant of a license to carry on a manufacturing business in the City of St. Louis. The amount of the tax was ascertained by and proportioned to the amount of sales of the manufactured goods whether sold within or without the state, and whether in domestic or interstate commerce. Failure to pay the license tax was a misdemeanor punishable by fine and imposition of a double tax, and the making of a false state-

ment respecting the amount of sales was punishable by forfeiture of the license in addition to the fine. The Court held that whether the state tax deprived one of rights under the Constitution, depends "not upon the form of the act nor upon how it is construed or characterized by the state court, but upon its practical operation and effect." (250 U.S. at 462-463). Said the Court, there is no doubt of the power of the state or of the city to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. The operation and effect of the tax ordinance is to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental or indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. It is, therefore, not a regulation of interstate commerce. The Court went on to approve the measuring of the tax by the amount of goods sold, though it might have been measured upon the value of all goods manufactured, whether sold or not.

Thereafter, in case after case, this Court has upheld the license or privilege or occupation tax in such notable examples as: *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172, an occupation tax, in this case on the business of mining measured by the value of the ore produced even though the ore was loaded immediately upon cars for shipment out of state; *Hope Natural Gas Company* v. *Hall*, 274 U.S. 284, a West Virginia occupation tax on the business of producing natural gas, measured by the value of the gas produced even though the gas is transported to other states for consumption: *Utah*

Power and Light Company v. *Pfost*, 286 U.S. 165, a state license tax on the business of producing electrical energy measured by the energy produced, notwithstanding the fact that production of electrical energy and transmission in interstate commerce are substantially instantaneous; *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472, a South Carolina license tax upon importing and storing gasoline from outside the state; *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250, a privilege tax on business measured by a percentage of gross receipts, in this case, from the sale of advertising space to in-state and out-of-state advertisers in a magazine circulated in and out of the state; *Coverdale* v. *Arkansas-Louisiana Pipe Line Company*, 303 U.S. 604, a Louisiana license tax on persons engaged in the business of manufacturing or generating electricity and on the privilege of using electric power in business, in this case, moving natural gas through an interstate pipeline; *Wisconsin* v. *J. C. Penney Co.* 311 U.S. 435, a privilege tax on the declaring and receiving dividends out of income derived from property located and business transacted in Wisconsin even though the dividends were declared by a foreign corporation outside Wisconson; *Memphis Natural Gas Company* v. *Beeler*, 315 U.S. 649, a Tennessee privilege tax on the business, in this case, of distributing natural gas to consumers from out-of-state sources, measured by net income from the distribution; *Memphis Natural Gas Company* v. *Stone*, 335 U.S. 80, a Mississippi privilege tax on the doing of business in the state, measured by the capital employed in the state, in this case upon a natural gas pipeline company, which did no intrastate business in Mississippi, but which maintained part of its interstate pipeline and compressor stations in Mississippi; *Interstate*

Oil Pipe Line Company v. *Stone*, 337 U.S. 362, a Mississippi privilege tax on business activities in the state measured by gross proceeds levied, in this case, on a pipeline company transporting oil within the state in the course of its interstate journey.

Practical Operation Governs, Not Labels

It is thus unmistakable that this Court has never been troubled that the local tax takes the form of a license tax on the privilege of doing local business. This Court has said (and repeated in different ways):

> " 'in passing on its constitutionality, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' . . . For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin* v. *J. C. Penney, Co.*, 311 U.S. 435, 444.

And, most recently, in *City of Detroit* v. *Murray Corporation*, 355 U.S. 489, 492, in sustaining a municipal ordinance against attack on grounds of unconstitutionality, this Court made plain that it was not concerned with the style of a taxing ordinance nor with its definition or the precise form of the descriptive words, but only with the practical operation, and said that the Court must "look through form and behind

labels, to substance. This is at least as true to uphold a state tax as to strike one down."

An Inapplicable or Unenforceable Remedy For Collection Does Not Defeat The Valid Tax

In its concern with form and labels, the Court of Appeals has compounded the error respecting the Mobile license tax by presuming, contrary to the exhortations of this Court, that the Mobile license tax ordinance will so operate that if, for example, a tax is not paid, there will be an immediate halt, by means of injunctive remedy, to the flow of interstate commerce (App. A, Jurisdictional Statement, at p. 27). Not only is there not a shred of evidence in the record that any such consequence has at any time flowed from the local administration of the ordinance, or that this is the local administrative or judicial interpretation of this ordinance, but the Court of Appeals has done what the Supreme Court has said neither a federal court nor a state court should do, i.e., "assume in advance that a construction will be adopted such as to render the law obnoxious to the federal constitution." *Utah Power and Light Company* v. *Pfost*, supra, 286 U.S. 165, 187.

This same problem was considered, not only in the *Utah Power and Light Company* case, but also at great length in *St. Louis SWR Co.* v. *Arkansas*, 235 U.S. 351. In that case the Arkansas franchise tax was imposed on the foreign corporation doing business in Arkansas for the privilege of exercising its franchise in the state, and was levied on the proportion of the capital stock represented by property owned and used in business transacted in the state. The Court upheld the tax as a legitimate imposition on a foreign corpora-

tion with respect to the exercise of the privilege of transacting business in the state.

Section 20 of the tax act also provided that, if a corporation failed to pay the tax, the Tax Commission shall cancel the certificate and the corporation shall forfeit its right to do business in the state, in addition to other penalties prescribed. The Court held that if this provision must be construed to mean that for non-payment a foreign railroad corporation engaged as a common carrier of intrastate and interstate commerce is to forfeit its right to do business in the state, not only with respect to intrastate, but also with respect to interstate commerce, the effect would be to impose a condition on the right to transact interstate commerce and the act would be invalid, as amounting to a regulation of interstate commerce unless the provision could be treated as separable.

But, said the Court, the state court has not as yet construed the section as calling for forfeiture of the privilege of doing interstate business in the event of non-payment, nor does the state insist on such a construction. The present action is an ordinary action to collect the tax as a debt, but not to forfeit the franchise. Further, said the Court, it is probable that the state court, when confronted with the question, would hold that the franchise to be forfeited is confined to intrastate commerce. It is proper for this Court to wait until the state court has adopted a construction of the statute on the facts rather than assume in advance that such a construction will be adopted as to render the law repugnant to the federal Constitution. At the present, therefore, we (the Court) have merely to inquire whether provision so clearly requires a forfeiture of the interstate franchise for non-payment that it is

not reasonable to anticipate the state court will put another construction upon it. The Court ought not indulge the presumption either that the legislature intended to exceed the limits imposed on state action by the federal constitution, or that the courts of the state will so interpret the legislation as to lead to that result. No canon of construction is better established or more universally observed, that if a statute will bear two constructions, one within, and the other beyond the constitutional power of the law-making body, the courts should adopt that which is consistent with the Constitution because it is to be presumed that the legislature intended to act within the scope of its authority.

Continuing, the Court said the remedial provision taken in context need not be construed to interfere with interstate commerce. The taxing provisions apply to all corporations irrespective of whether engaged in interstate commerce. It is, therefore, natural that the remedy should have language of general scope. But it need not be indiscriminately applied to the several kinds of corporations subject to the Act. "In view of these considerations we ought to assume, until the state, through its judicial or administrative officers, places a different construction upon the Act, that § 20 will be limited in its operation to forfeiting for non-payment of the franchise tax only the privilege of doing intrastate business; or else that the section, being void for unconstitutionality, will be treated as severable from the other provisions of the Act. Under either view it is obvious from what has been already said, that the tax does not amount to a regulation of or a burden upon interstate commerce." 235 U.S. 351, 369-371. And, this rule in testing constitutionality of state tax enactments is applicable whether the controversy

arises in the state or federal courts, *Utah Power and Light Co.* v. *Pfost*, 286 U.S. 165, 186-187, and see *Arizona Copper Co.* v. *Hammer*, 250 U.S. 400, 430.

Thus, in the absence of any evidence, or claim on the part of local authorities, that the ordinance could or would be so used as to bring about a halt to the interstate flow of the natural gas if the taxes were not paid (the ordinance does not even refer to injunctive relief among the remedies specified for its enforcement), this Court has laid out the pattern by which such an ordinance should be construed, which forbids the construction of an unenforceable remedy unnecessary to the existence of the tax, to defeat the otherwise valid local tax.[5]

This salutary concept of reconciliation, which avoids confusing valid local action with invalid or inapplicable alternate remedies for enforcement, has been adopted by this Court in other areas of federal-state accommodation. In *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 162, the Court upheld a state registration requirement imposed on interstate truckers for information purposes. This Court refused to consider the possible effect of a refusal of a permit saying, "It will be time enough to consider apprehended burdensome conditions when and if the state attempts to impose and enforce them." Likewise, in *Castle* v. *Hayes Freight Lines*, 348 U.S. 61, 64, this Court reaffirmed the validity of state weight laws for interstate trucks using the state highways, but

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[5] As a minimum, rather than striking down the ordinance on the faulty assumptions made as to the applicability of the alleged remedy of injunction against interstate commerce, the Court of Appeals might have directed a reference to the state courts for interpretation, as was done in *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101.

separated and eliminated the remedy of suspension by the state of the federally certificated right to operate on the highways, pointing to the existence of conventional forms of punishment "as adequate to protect the states from overweighted or improperly loaded trucks."

CONCLUSION

We think it is evident that the Court of Appeals for the Fifth Circuit has, in this case, departed from the rules and precedents set by this Court for determining the constitutionality of the exerted state taxing power by:

1. Fastening on the word or label "license", rather than on the practical operation of the ordinance as a tax;

2. Viewing the tax as a license condition to engage in interstate commerce, rather than a tax on the incident privilege of making sales to consumers at the end of that commerce; and

3. Unwarrantedly associating with the "license" an alleged requirement that it must be revoked and interstate commerce halted if the tax is not paid.

In the latter connection, the Court of Appeals has purported to state or infer a claim for Mobile which Mobile does not profess to make. On the contrary, Mobile's ordinance specifically provides that no provision thereof shall be applied so as to impose an unlawful burden on interstate commerce. The ordinance does not include the licensing ingredients associated with licensing regulation. It requires only the payment of taxes and provides for collection by the ordinary remedies usual in the collection of local taxes.

Unless the Court of Appeals' decision is overturned, the effect will be to exempt interstate commerce from

the taxes which similar local business must bear, beyond the necessity to keep interstate commerce free from interference.

The Court has repeatedly said that interstate commerce must bear its fair share of local tax burdens. Here the privilege of selling and delivering natural gas to industrial consumers at the end of the interstate journey is involved. The sales, deliveries, and use are local, and the earnings therefrom are locally derived. The local taxing power exerted is directly and fiscally related "to the protection, opportunities and benefits" afforded by the taxing jurisdiction.

Mobile joins with the appellants, or petitioners, in respectfully requesting that this Court review and reverse the judgment of the Court of Appeals and restore the judgment of the District Court.

Respectfully submitted,

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